Nos. 91-1111 and 91-1128

In the Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., ET AL.,
AND
MERRETT UNDERWRITING AGENCY MANAGEMENT
LIMITED, ET AL.,
PETITIONERS

v.

STATE OF CALIFORNIA, ET AL., RESPONDENTS

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS IN NO. 91-1111

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I. THE FORFEITURE RULING IS ERRONEOUS

The Solicitor General agrees with us that the Ninth Circuit's forfeiture ruling is "wrong." U.S. Br. 12. As he explains, Congress understood the vital role of foreign reinsurance in the United States and the need for agreements between insurers and reinsurers, and did not expect that these agreements would result in forfeiture of McCarran immunity. *Id.* at 10-12.

Perhaps the best evidence that the court of appeals' forfeiture ruling is indefensible is that plaintiffs make no effort to defend it on its own terms. Rather, they argue that the domestic defendants (a) were responsible as "co-conspirators" for the actions of unregulated foreign reinsurers and (b) forfeited immunity for their own acts because they furthered the "non-exempt conspiracy." St. Br. 35-37, 42; Pr. Br. 35-39. These merely verbal variations of the Ninth Circuit's forfeiture theory add nothing to its substance.

Plaintiffs' "non-exempt conspiracy" arguments rest on a mistaken view of state regulatory authority over the conduct at issue. As we explain (pages 2-6, *infra*), the activities of the foreign reinsurer defendants in which the domestic defendants allegedly joined *were* subject to state regulation. But even if the activities of the foreign reinsurers were not regulated, the conduct of the *domestic* insurance defendants would not be any less a part of the regulated business of insurance.

A rule that exposed insurance companies to antitrust attack as "co-conspirators" whenever they reached agreement with foreign reinsurers would unravel McCarran and seriously disrupt established insurance practices. See *City of Columbia* v. *Omni Inc.*, 111 S. Ct. 1344, 1351 (1991) (rejecting a "conspiracy exception" that would "virtually swallow" an antitrust immunity). Plaintiffs' amorphous conspiracy theory also would deny insurance companies immunity for cooperative activities with unregulated consumer organizations and corporate risk managers. NCOIL Am. Br. 15.

As both lower courts found (Pet. App. 25a, 41a-42a), the claim that defendants conspired to restrain trade in the umbrella and excess insurance markets (J.A. 46, 97) alleges no boycott. Because the judgment on that claim rests *solely* on the court of appeals' erroneous forfeiture ruling, it must be reversed.

II. ALL OF THE RELEVANT REINSURER CONDUCT WAS SUBJECT TO STATE REGULATION

Plaintiffs challenge (Pr. Br. 26-34) the holding of both courts below (Pet. App. 20a, 48a-49a) that "American reinsurers" are "subject to regulation by the states and therefore prima facie immune." That challenge comes too late. *Lucas* v. *So. Carolina*, 112 S. Ct. 2886, 2896 n.9 (1992). The issue whether domestic reinsurers are regulated by the states is not included in the grant of certiorari. Nor did plaintiffs raise that issue in a cross-petition, as they were required to do because their argument would modify the judgment below. *T.W.A.* v. *Thurston*, 469 U.S. 111, 119 n.14 (1985). The Ninth Circuit held that foreign reinsurers were unregulated and therefore dismissed all state insurance law claims (J.A. 49-50) against them. Pet. App. 19a-20a. If accepted, plaintiffs' argument that the states do not regulate "American reinsurers" would require dismissal of the state-law claims against them as well. An argument that would produce such a modification in the judgment below requires a cross-petition. *FEA* v. *Algonquin SNG*, 426 U.S. 548, 560 n.11 (1976).

In any event, plaintiffs' assertion (Pr. Br. 29) that the reinsurer defendants "operat[ed] unfettered by state regulation" is plainly wrong. To be sure, reinsurance is regulated *differently* from primary insurance, as the articles cited by plaintiffs explain.[1] The question for McCarran purposes, however, is whether the *activities* of the reinsurers *challenged in plaintiffs' complaints* were "regulated by State Law." Examination of the "uncontested details of the state regulatory systems" (St. Br. 2 n.1), as presented to

[1] *E.g.*, Havens & Theisen, 54 ANTITRUST L.J. at 1304 (reinsurers are subject to a state "regulatory scheme [that] is an eminently logical one given the nature of reinsurance"); Thompson, 16 FORUM at 1043 ("state regulation of reinsurance plays an important role in the way reinsurers run their business"). These articles address the McCarran immunity only in general terms. *E.g.*, Havens & Theisen at 1309, 1318 (cases indicate that McCarran's "exemption remains available to reinsurers," but "[t]here are not enough [cases] to establish [this proposition] with confidence"). None of these articles addresses the question whether conduct of the kind alleged in *this* case is subject to regulation through the forms-approval process and unfair insurance practices legislation.

both courts below in multi-volume state-by-state appendices, establishes that they clearly were.

It is particularly untenable to suggest that domestic reinsurers' cooperation with primary insurers in forms development—conduct at the very heart of the McCarran exemption—was not regulated by the states. Regulators intensively scrutinized the development and implementation of the proposed CGL forms filed between 1984 and 1986. See Pet. Br. 6-8; J.A. 113-127. State insurance departments reviewed these forms with unprecedented thoroughness, holding public hearings and receiving the views of state attorneys general and others (including reinsurers). J.A. 115-117. Regulators were well aware of reinsurers' participation and their dissatisfaction with existing coverages. *E.g.*, J.A. 118, 133-134, 165, 174, 175, 177-178. They had the power to limit, disapprove, or require modification of any proposed forms determined to be anti-competitive or otherwise against the public interest—and used that power repeatedly. J.A. 119, 121-127, 132-151. Plaintiffs could have brought any claim of anti-competitive behavior to these regulators at any time, and they are free to do so today.

In addition, the district court correctly held (and the Ninth Circuit did not disagree) that all of the conduct attributed to the domestic reinsurers fell within the reach of state unfair insurance practices acts (UIPAs), which prohibit anti-competitive conduct by "any persons in the business of insurance, including reinsurers." Pet. App. 48a-49a. These laws are sufficient to support McCarran immunity. *FTC* v. *National Cas.*, 357 U.S. at 564.

Plaintiff California's UIPA, for example, under which a claim was asserted against all of the reinsurer defendants (J.A. 49-50), prohibits "a broad spectrum of unfair and deceptive practices and anticompetitive activity in the insurance field." *Karlin* v. *Zalta*, 201 Cal. Rptr. 379, 390 (Ct. App. 1984). It specifically bars any "trade practice" that is "an unfair method of competition or an unfair * * * act or practice in the business of insurance." Cal. Ins. Code §§ 790.02, 790.06(a); J.A. 186-187, 228-229. This law was enacted "to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the [McCarran Act]." J.A. 187. Thus, in California "a reinsurer * * * is potentially subject to a broad range of anti-competitive and

unfair practices proscriptions" that constitute state regulation for McCarran purposes. Bank & Trent, ***Regulation of Reinsurance***, in REINSURANCE LAW, LITIGATION AND ARBITRATION IN THE UNITED STATES 77, 82-83 (1991). Other states' UIPAs—which like California's were enacted to invoke McCarran immunity—impose the same requirements. Def. State-by-State App. ¶ (1); St. Reg. App. ¶¶ B, F. More generally, states may license reinsurers, deny credit to primary insurers for business ceded to unapproved reinsurers, set conditions on approval of reinsurers, and require reinsurers to designate agents for service of process. Bank & Trent at 80; Ins. Agents Am. Br. 10.

The alleged conduct of the foreign reinsurers was subject to substantially identical supervision. Whatever the truth of the claim that states do not "regulate the bulk of international insurance transactions" (St. Br. 4 n.7), it is plainly inapplicable to the specific allegations here. The states regulated the foreign reinsurers' participation in forms development through the forms-approval process and had power to supervise their contracts with primary insurers. All foreign reinsurers were also within the scope of state UIPAs. Indeed, many plaintiffs filed UIPA claims against *all* reinsurer defendants. J.A. 49-50. Only New York has denied that its UIPA reaches foreign reinsurers' conduct (N.Y. Supp. Ct. App. Brs.; St. Br. 34); that interpretation is contrary to the statute's plain language, which broadly applies to any entity "engaged in the business of insurance" in the state (N.Y. Ins. Law § 2402(a)), not only to entities licensed as "doing an insurance business" in New York. *Id.*, § 1101. Plaintiffs also admit that regulatory orders can effectively be enforced against foreign reinsurers. St. Br. in 91-1128, at 39-40.

National Casualty leaves no doubt that state UIPAs constitute sufficient regulation under McCarran. 357 U.S. at 564-565. See also, *e.g.*, *Workers' Comp. Ins. Antitrust Litig.*, 867 F.2d at 1559. This Court squarely rejected plaintiffs' claim (St. Br. 38 n.43) that state regulation qualifies for McCarran purposes only when it is "effectively applied" and not "inchoate." *National Cas.*, 357 U.S. at 564. It thus distinguished between McCarran's regulation requirement and the more rigorous rule in *Parker* v. *Brown*. See Pet. Br. 17 n.7. Plaintiffs' *Parker* argument would destroy

McCarran as an independent exemption and was disapproved by Congress. H.R. Rep. No. 873, at 7; S. Rep. No. 1112, at 5.

Likewise, *National Casualty* rejected plaintiffs' specious theory (St. Br. 39 n.45) that because McCarran commands that federal laws not be construed to "invalidate" state regulation, its immunity is triggered only when state regulation conflicts with antitrust law. See also 91 Cong. Rec. 1478 (Sen. Pepper); *Workers' Comp.*, 867 F.2d at 1559. Indeed, amici candidly concede (19 St. Am. Br. 25 n.30) that acceptance of plaintiffs' arguments *would necessitate overruling National Casualty*.

Plaintiffs further argue that "state regulation of activities carried on beyond the borders of the regulating state" does not activate McCarran immunity. St. Br. 34-35; Pr. Br. 32-33. But plaintiffs acknowledge that the effects of the foreign reinsurers' alleged actions "occurred principally or exclusively" in domestic markets and that those actions were intended to have and had a "significant effect" on local commerce. J.A. 254-255; St. Br. in 91-1128, at 20-22, 40. Under current due process principles the states have undoubted jurisdiction in these circumstances. *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957).

Plaintiffs nevertheless contend (Pr. Br. 32-33) that only regulation regarded as constitutional when McCarran was enacted can qualify for immunity, and that in 1945 the states lacked jurisdiction over such practices. This crabbed interpretation contradicts McCarran's goal of supporting "existing and future state [regulatory] systems" (*Prudential Ins.* v. *Benjamin*, 328 U.S. 408, 429 (1946)) and has no basis in McCarran's text or the cases plaintiffs cite. The strict territorial due process restriction plaintiffs read into McCarran broke down long before the Act was passed (*e.g.*, *Doherty* v. *Goodman*, 294 U.S. 623 (1935)); by the time McCarran was enacted it was settled that a "minimum contacts" standard permits the states to regulate acts that have effects on local residents. *International Shoe* v. *Washington*, 326 U.S. 310 (1945); *Travelers Health Ass'n* v. *Virginia*, 339 U.S. 643 (1950) (citing pre-McCarran cases).[2]

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[2] Plaintiffs' reliance on *FTC* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960), also is misplaced. That case held that while "a single State's

Plaintiffs' radical theory that reinsurers cannot be regulated by state law not only would inflict serious injury on state regulatory systems but also would defeat McCarran's core purposes. Congress intended to immunize consultations between primary insurers and reinsurers about the terms of coverage. See Pet. Br. 19-20, 32-34; U.S. Br. 12. If plaintiffs' argument were correct, such cooperation would automatically be exposed to antitrust attack. This would result in the "chaos and confusion" that Congress meant to avert when it fashioned the antitrust exemption. 91 Cong. Rec. at 1485 (Sen. McCarran).

III. PLAINTIFFS' McCARRAN BOYCOTT CLAIMS ARE INSUFFICIENT AS A MATTER OF LAW

Plaintiffs' multi-count complaints are replete with detailed allegations of meetings, discussions, and public announcements by defendants that are darkly characterized as coercive "boycotts." Citing these allegations, the court of appeals held that plaintiffs had pleaded "much more" (Pet. App. 21a) than an agreement among defendants on terms of insurance. Challenged to defend the Ninth Circuit's ruling, plaintiffs now beat a hasty retreat from their sprawling theory of boycott and instead articulate an argument that, by being more sharply defined, is all the more clearly insufficient as a matter of law. Plaintiffs' case, it turns out, is really about "much less," not "much more."

Nowhere in their briefs do plaintiffs even mention—let alone justify as charging a "boycott"—the individual claims in the so-called "forms development" counts against the domestic defendants and various foreign reinsurers (J.A. 36-43, 90-92) and the "market conduct" counts against the foreign reinsurer defendants (J.A. 43-46, 47-49, 92-97). Rather, plaintiffs refer indiscriminately to

attempted regulation of its domiciliary's extraterritorial activities" would not suffice for McCarran immunity, regulation by the state in which an act "has its impact" or "operative force" is enough. *Id.* at 297-299, 301-302. *State Bd. of Ins.* v. *Todd Shipyards*, 370 U.S. 451 (1962), simply denied state power to tax insurance premiums without a reasonable nexus to the taxing state. Neither case suggests that McCarran leaves state regulators powerless to reach ongoing commercial conduct that is intended to and does have a substantial impact on local economies.

defendants and counts as if they were all linked to a single overarching conspiracy. Although such a "global conspiracy" was pleaded (J.A. 88-90) in the Connecticut complaint (it was not included in the California complaint at all), it was *dismissed* by the district court on the ground that "the allegations of the complaint would not permit proof of [a single overall conspiracy]" (Pet. App. 69a), and that dismissal was *affirmed* by the Ninth Circuit with leave for plaintiffs to seek to amend. *Id.* at 27a. *Plaintiffs thus have hinged their boycott argument on a count that is not currently in the case* and that will be subject to vigorous challenge in the district court if and when plaintiffs offer a specific amendment. See *Associated General Contractors*, 459 U.S. at 528 n.17 ("in a case of this magnitude, a district court must retain the power to insist upon some specificity of pleading before allowing a potentially massive factual controversy to proceed"); *Llewellyn* v. *Crothers*, 765 F.2d 769, 775 (9th Cir. 1985) (Kennedy, J.) ("'[v]ague and unsupported conspiracy allegations deserve very little respect from the antitrust court'").[3]

Having clarified the nature of plaintiffs' complaints, we do not shrink from meeting the broadest reach of their argument. As demonstrated below, plaintiffs' claims—whether considered individually or together, and with or without an allegation of global conspiracy—are legally inadequate under McCarran. However, the sweeping allegations of plaintiffs' complaints against commonplace meetings and discussions among insurers over acceptable terms of insurance, coupled with the Ninth Circuit's amorphous "much more" ruling on boycott, have understandably caused confusion in the insurance industry. At a minimum, this Court should make clear, as plaintiffs and the Solicitor General now concede (St. Br. 2, 5-6 n.9, 22, 30; U.S. Br. 8), that the normal process conducted under the auspices of ISO and regulated by the states for jointly

[3] Plaintiffs incorrectly assert that they were denied discovery (St. Br. 10-11 n.15, 23 n.25); the order limiting discovery to undisputed facts was confined to discovery submitted before the filing of dispositive motions, and in fact plaintiffs requested—but withdrew as unnecessary—discovery as to disputed facts. See J.A. 105, 110-111. Despite their two-year investigation (Pet. App. 57a-58a, 83a-84a), plaintiffs have never raised any factual issue material to their boycott claim.

proposing, debating, and revising standardized advisory insurance forms—including, as alleged here, solicitation of the views of reinsurers as to whether they would offer reinsurance on the proposed forms—does *not* constitute a boycott.[4]

The gravamen of plaintiffs' boycott theory is that "defendant primary insurers enlisted reinsurers 'to compel capitulation' by competing primary insurers to the defendants' demands" for elimination of "long-tail and pollution insurance" coverages. St. Br. 2, 3. According to plaintiffs, the reinsurers agreed that they would not provide reinsurance for long-tail and pollution coverages included in the proposed ISO advisory forms, thereby causing ISO to modify those coverages, and the foreign reinsurers further agreed not to reinsure primary insurance written on any basis for long-tail and pollution risks. *Id.* at 7-8.[5] Moreover, following state approval of the revised 1986 ISO forms, ISO discontinued statistical support for its superseded 1973 form. *Id.* at 9.

Plaintiffs concede that under McCarran, primary insurers may confer and agree on terms of insurance; that reinsurers may similarly confer and agree; and that primaries and reinsurers may confer and agree on the terms on which they will do business with each other. With all this, we agree. See pages 16-19, *infra*. Thus, the basic difference between us and plaintiffs is reduced to the question whether a McCarran boycott can be established by

[4] Plaintiffs' concession highlights the particular weakness of their boycott claim with respect to the forms-development counts. Standardization of advisory policy forms is central to the state-regulated business of insurance that Congress intended to protect from federal antitrust review. The reinsurers' determination that they would not reinsure certain coverages in the proposed forms that they believed presented unacceptable risks, for the asserted purpose of altering the forms that would be submitted to state insurance regulators for approval, cannot be deemed a "boycott" without creating a gaping hole in McCarran immunity and impairing the integrity of the state regulatory process. See Pet. Br. 2-3, 19-20, 32-34, 48; American Ins. Ass'n Am. Br. 9-22.

[5] Plaintiffs do not contend that any defendants engaged in an absolute refusal to deal or discriminated by refusing to provide reinsurance to particular primary insurers on the same terms available to others.

allegations that an agreement among defendant insurers and reinsurers relating to general terms of coverage has an effect on other primary insurers. Where, as here, the agreement simply provides for acceptable coverage terms and is not even alleged to exclude or discriminate against any primary insurer, such allegations do not transform a protected agreement into an unprotected boycott.

A. *Statutory language*. Section 3(b) of McCarran speaks of "boycott, coercion, or intimidation." The natural meaning of those related terms plainly requires conduct that is oppressive or destructive in nature. See, *e.g.*, BLACK'S LAW DICTIONARY (5th ed. 1979) at 234 ("coerce" means "constrained to obedience, or submission in a vigorous or forcible manner"), 737 ("intimidation" means "[u]nlawful coercion; extortion; duress; putting in fear"). Congress so understood this language in adopting McCarran. See 90 Cong. Rec. at A4406 (the boycott exception applies to "oppressive or destructive practices"), 6625 (Sen. Hatch) (the boycott exception applies to "vicious," "obnoxious," and "evil" practices). And in *SEUA*, this Court made clear that the alleged "boycott[,] * * * coercion and intimidation" represented just "such destructive business practices." 322 U.S. at 535, 562. Accordingly, as used together with "coercion" and "intimidation," the word "boycott" in McCarran cannot be stretched to reach the type of conduct alleged here, which (until this case) has been a normal and frequently occurring part of the business of insurance, and which, as the Solicitor General suggests (U.S. Br. 14 n.11; U.S. Pet. Br. 14-16), is not so clearly anti-competitive as to be subject to a per se rule rather than the rule of reason. It is both unprecedented and unwarranted to label as a "boycott" agreements on acceptable terms of insurance "directed primarily at reducing * * * exposure to certain risks and controlling losses, a legitimate business purpose." Pet. App. 81a-82a.

B. *Legislative history*. McCarran's legislative history establishes with unusual clarity the paradigms of the activities that are exempt from the federal antitrust laws under the basic statutory immunity and those to which the Sherman Act applies under the boycott exception. As Congress understood, agreements among insurers on terms and conditions of insurance, which traditionally have been part of the business of insurance and are undertaken pursuant to state regulation to protect the public interest, fall within the safe

harbor of immunity. However, concerted conduct that is unambiguously pernicious and tantamount to a system of private government controlling the insurance industry, and that therefore is inherently unjustifiable and does not call for the informed superintendence of expert state insurance regulators, remains subject to the Sherman Act. Because the activities at issue in this case are at the heart of the former category and bear no resemblance to the latter, they are immune.

Throughout its consideration of McCarran, Congress recognized that, given the unique nature of insurance, a wide range of agreements was legitimate and served to promote insurer solvency, placement of reinsurance, and accurate data collection and underwriting projections. See Pet. Br. 2-3, 19-20, 32-34 & n.15. Congress understood that these agreements would extend (subject to state regulation) to such matters as "rates" (H.R. Rep. No. 873, at 8), "forms of policies" (*ibid.*), "forms of coverage" (*Committee Print* at 5; 90 Cong. Rec. at 6526 (Rep. Hancock)), and "terms" and "conditions" (*id.* at 6536 (Rep. Howell)). This understanding applied fully to the final version of the bill that emerged from conference; the post-conference debates acknowledged that these agreements were legitimate and in the public interest. For example, Senator O'Mahoney, one of the conferees, stated that a rating bureau agreement to set prices would be protected under the Act and was an example of the kinds of "agreements which can normally be made in the insurance business which are in the public interest, but which might conceivably be a violation of the antitrust law." 91 Cong. Rec. at 1444; see also *id.* at 1481, 1484 (Sen. Ferguson), 1481 (Sen. Pepper), 1485, 1486 (Sen. O'Mahoney).[6]

In enacting the boycott exception, Congress had in mind a completely different type of conduct and never conceived that an agreement on insurance terms could be a boycott. The boycott

[6] Plaintiffs (St. Br. 31 n.36) fault us for relying on legislative history of bills that preceded the final version of McCarran. However, Justices of this Court repeatedly have referred to the same history. See Pet. Br. 19 n.9. Moreover, the propositions for which we cited this history are equally supported by the post-conference debates discussed in text. And in fact plaintiffs and the Solicitor General ultimately agree with us as to those propositions.

section was inserted in the bill at conference. In explaining that provision, Senator O'Mahoney observed that "there are three forms of regulation": state regulation; federal regulation; and the "third, and this has been harmful to the public interest, is regulation by private combinations and groups," which has been "enforced * * * through private rules and regulations under which persons engaged in the insurance industry could be tried and convicted for the violation of private law." 91 Cong. Rec. at 1483. The boycott exception accordingly was intended to prevent "a system of private government" in which "private groups sought, by the imposition of penalties, by writing rules and regulations, and by holding secret trials * * * to enforce not public regulations written by public authority but regulations for the insurance business which they wrote themselves in their wholly private and exclusive associations." *Id.* at 1485 (Sen. O'Mahoney). The boycott exception would "outlaw[ ] completely all steps by which small groups have attempted * * * to say who should and who should not engage in the insurance business." *Ibid.*

The legislative record discusses a number of insurance organizations—including SEUA (see pages 13-14, *infra*)—that had prescribed private rules and imposed severe penalties (including "discrimination" and "blacklist[ing]") in an effort "to exercise complete control over [the] vast [insurance] industry." See, *e.g.*, 91 Cong. Rec. at 1483 (Sen. Radcliffe), 1485-1486 (Sen. O'Mahoney), 1087 (Rep. Celler); 90 Cong. Rec. at 6546 (Rep. Voorhis), 6560 (Rep. Celler). It was this "sort of agreement which ought to be condemned * * * and which, in the language of [the boycott provision] of the conference report * * * would be completely outlawed." 91 Cong. Rec. at 1486 (Sen. O'Mahoney). See also *id.* at 480, 1481 (Sen. Ferguson), 1485-1486 (Sen. O'Mahoney), 1486 (Sen. Barkley); 90 Cong. Rec. at 6625 (Sen. Hatch).[7]

[7] It was in this context that Congress noted, in a passage plaintiffs heavily rely upon (St. Br. 26 n.29, 30), that the boycott provision would prohibit an agreement among insurers to "penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them." 91 Cong. Rec. at 1480 (Sen. O'Mahoney). This concept of "penaliz[ing] * * * disapproved" conduct refers to the kind of "ruthless program" (*Joint Hearing* at 47-48) involved in *SEUA*, not to agreements to do business on acceptable terms.

This history demonstrates the total fallacy in plaintiffs' boycott allegations. The crux of their theory is that defendant primary insurers and defendant reinsurers agreed on acceptable terms of insurance coverage. Congress understood, however, that such agreements, while impermissible in other industries, were appropriate in the business of insurance and hence exempted from antitrust attack. Where the challenged conduct is no more broadly restrictive of competition than an agreement on acceptable terms of insurance—and such agreements are all that are alleged here—it comes within the safe harbor of McCarran immunity. See Pet. Br. 29-30, 31-32, 34-35.

C. ***Conditional refusals to deal, Barry, and SEUA***. Plaintiffs also argue that a conditional refusal to deal is a McCarran boycott and that neither an absolute refusal to deal nor discrimination against boycott targets is required. But absolute refusals to deal and discrimination are the traditional hallmarks of a boycott, as shown by the boycott opinions of this Court that preceded passage of McCarran (*Lumber Dealers*, 234 U.S. at 608-609, 611; *FOGA*, 312 U.S. at 461) as well as more recent opinions on which plaintiffs rely (*Klor's*, 359 U.S. at 209, 213; *Northwest Stationers*, 472 U.S. at 294-296 & n.6). See Pet. Br. 32 & n.14. In the particular context of McCarran, which sought to immunize agreements among insurers on terms of insurance, these factors take on special significance in identifying those agreements that are more broadly restrictive of competition than an agreement on terms or conditions. If insurers collectively refuse to deal with others on any terms or discriminate between favored and disfavored entities in the provision of insurance, their agreement is fundamentally different from—and significantly more anticompetitive than—an agreement over the terms and conditions on which they will engage in the business of insurance. Conversely, where, as in the present case, insurers jointly agree to provide insurance on specified terms but not on others (which is all plaintiffs mean by a conditional refusal to deal) and make insurance available on those terms to *all* customers, that is nothing but an agreement on terms.[8]

[8] Contrary to plaintiffs' assertion (St. Br. 25, 27), the legislative history discloses Congress's concern over discriminatory conduct used to "boycott" or exclude targeted companies. See, *e.g.*, 91 Cong. Rec. at 1483 (Sen. Radcliffe) (the boycott provision prevents "boycotting or unjust discrimination"); 90 Cong. Rec. at 6560 (Rep. Celler).

In arguing that a conditional refusal to deal is a McCarran boycott, plaintiffs all but ignore this Court's carefully balanced opinion in *Barry*. That case involved "a 'traditional boycott,' defined as a concerted refusal to deal on any terms, as opposed to a refusal to deal except on specified terms." 438 U.S. at 540. Time and again, the Court emphasized that the defendants, by "refus[ing] to deal on any terms," had gone "well beyond a private agreement to fix rates and terms of coverage." *Id.* at 544, 553. Notwithstanding plaintiffs' argument that these repeated references were merely part of the Court's statement of facts but not part of its legal holding, *Barry* plainly recognized (as the dissent urged) that an agreement over insurance terms could *not* be deemed a boycott. See Pet. Br. 28-31.

Plaintiffs also grossly distort *SEUA* in asserting that it is "indistinguishable" from the present case. St. Br. 21. Contrary to plaintiffs' contention (*id.* at 21-22 n.21), *SEUA* involved an absolute refusal to deal. See Pet. Br. 35.[9] But even if *SEUA* could be characterized as a conditional-refusal case, it provides no support for plaintiffs' boycott theory here.

In *SEUA*, reinsurance was "cut off" (322 U.S. at 535) to all non-SEUA members. Membership in SEUA required adherence to a complex array of privately-fashioned business standards, not simply agreement on specified terms of primary insurance for which reinsurance was sought. Thus, reinsurance was denied *altogether* to non-members, which was done for reasons *entirely unrelated to the terms* on which the primary insurance was written.

[9] The legislative history reflects Congress's understanding that SEUA and other regional associations determined "who should and who should not engage in the insurance business." 91 Cong. Rec. at 1485 (Sen. O'Mahoney); see also 90 Cong. Rec. at 6560 (Rep. Celler). Plaintiffs' argument that SEUA sought to bring all insurers within the Association, rather than to exclude non-members from the market, also collapses the price-fixing conspiracy in count 1 of the indictment into the monopolization conspiracy in count 2.

Indeed, "members are required to withhold reinsurance from nonmember companies *no matter how well the risk may be secured.*" S. Rep. No. 1112 (pt. 2), at 5 (minority views of Sen. O'Mahoney) (emphasis added); see also *Joint Hearing* at 48-49, 334-335. Here, in marked contrast, it is alleged not that defendant reinsurers completely refused to do business with any primary insurer, but rather that they declined to provide reinsurance for unacceptable primary coverages—whether offered by alleged co-conspirators or alleged boycott targets.

In addition, the denial of reinsurance in *SEUA* was simply one part of a comprehensive effort "to compel persons who needed insurance to buy only from S.E.U.A. members." 322 U.S. at 535. Among other things, SEUA "punished" agents by withdrawing all of its members' business from them if they "defiantly represented" non-SEUA members; it "boycott[ed]" and "withdr[ew]" all of its members' patronage from companies that purchased insurance from non-SEUA insurers; it "disparaged" the non-SEUA companies; and, as Congress stressed in enacting McCarran, it "effectively policed" the conspiracy through a network of bureaus and boards. *Id.* at 535-536. The denial of reinsurance in *SEUA* cannot be isolated from the rest of this patently coercive scheme.

D. ***Sherman Act precedents.*** Unable to allege a boycott under McCarran's language, history, and case law, plaintiffs contend (St. Br. 12, 18 & n.18) that Sherman Act precedents—indeed, the broadest and most recent constructions of "boycott" under the Sherman Act—should uncritically be imported into McCarran. That theory rests on a distortion of *Barry* and would eviscerate McCarran immunity.

In *Barry*, the Court noted that "in the absence of indications to the contrary," Congress "may be assumed [to have] intended this [McCarran boycott] language to be read in light of" the "tradition of meaning" of boycott "as elaborated in" Sherman Act decisions. 438 U.S. at 541. At the same time, however, the Court acknowledged that Sherman Act "decisions reflect a marked lack of uniformity in defining the term" and indeed that "'boycotts are not a unitary phenomenon.'" *Id.* at 543. And the Court also recognized that it had to consider the particular "history" of the McCarran Act and the "mischief" the statute was designed to

remedy. *Id.* at 545-546. This careful analysis refutes plaintiffs' simplistic view that Sherman Act cases control the meaning of "boycott" for McCarran purposes.

Nor could plaintiffs' position be accepted without doing irreparable violence to McCarran. In enacting McCarran, Congress recognized that Sherman Act definitions are "difficult and vague" and have been "variously interpreted and variously misunderstood." 91 Cong. Rec. at 1480, 1487 (Sen. O'Mahoney). McCarran was designed to afford greater certainty to the insurance industry in order "to bring clarity out of a situation of confusion" and thereby avoid the "fear [that insurers] would be in violation of the antitrust law when undertaking to pursue a course which seemed to be in the public interest." *Ibid.* Plaintiffs would relegate the insurance industry to the vagaries and uncertainties that McCarran was intended to eliminate.

In addition, plaintiffs' boycott theory is analytically self-defeating. Virtually all Sherman Act violations can be framed as boycotts, *e.g.*, a price-fixing agreement can be described as a concerted refusal to deal at any other price. This point was noted by the dissenting Justices in *Barry* (438 U.S. at 559 n.6) and has been recognized both by lower-court judges and by commentators. See Pet. Br. 28-29, 44; Areeda & Hovenkamp at 123 (Supp. 1992). If Sherman Act precedents were incorporated wholesale in McCarran, a host of agreements among insurers would be removed from McCarran immunity, directly contrary to the understanding of this Court and Congress that such agreements are exempted. See *Barry*, 438 U.S. at 555; Pet. Br. 34. This absurd result is illustrated by the *Superior Court Trial Lawyers* case cited by plaintiffs; the concerted agreement in that case to refuse to provide services except at a specified price, which the Court characterized as a price-fixing boycott under the Sherman Act (493 U.S. at 422-423, 430-431, 436 n.19), would plainly be protected by McCarran if insurers agreed to offer insurance only at a collectively acceptable rate. In light of the line Congress deliberately drew in McCarran between immune agreements and non-immune boycotts, it is especially clear here that "the category of restraints classed as group boycotts is not to be expanded indiscriminately." *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447, 458 (1986). See also *Barry*, 438 U.S. at 564 (Stewart & Rehnquist, JJ., dissenting)

(broad construction of boycott provision would defeat the "compromise" Congress reached).

The other Sherman Act cases upon which plaintiffs rely reinforce this conclusion. For example, in contrast to the private product-approval procedure in *Radiant Burners*, the question whether insurers have acted anti-competitively in setting standardized insurance terms is entrusted by McCarran to state regulators and would not be open to a federal antitrust court to resolve. Moreover, unlike the gas suppliers in *Radiant Burners*, who had no legitimate reason for refusing to deal with the disfavored manufacturer's customers and thus were engaged in a naked effort to coerce them to stop dealing with that company (364 U.S. at 659), reinsurers assume part of the risk underwritten by primary insurers and therefore have a legitimate interest in the terms of the policy they are asked to reinsure. See Pet. Br. 1-2.[10] Similarly, in *General Motors*, (a) GM did not simply set the terms on which it would do business with its dealers, but rather refused to do business with targeted dealers because of the way in which they did business with their customers (384 U.S. at 140, 144); (b) the concerted scheme sought to "remov[e] from the market * * * a class of traders" and "put [them] out of business entirely" (*id.* at 148); and (c) as in *SEUA*, there was an elaborate system "to police" the boycott agreements through "multilateral surveillance and enforcement" (*id.* at 144). In none of these respects is the present case remotely comparable to *General Motors*.

E. ***Enforcement activity.*** Apparently recognizing the shortcomings in their preceding arguments, plaintiffs fall back on the claim (St. Br. 12, 20 & n.20) that defendants engaged in "enforcement conduct" that transformed their otherwise protected agreements into a boycott. This claim is nothing but semantics.

1. Plaintiffs concede, as they must, the "incontestable" principle (Pet. App. 21a) that agreements among primary insurers on terms of insurance are protected by McCarran. Thus, they acknowledge that agreements on and use of standardized forms, as

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[10] Likewise, in *Barry*, the other three insurance companies had no legitimate reason for allegedly refusing to deal with St. Paul's customers.

well as other agreements on terms and conditions, are entitled to immunity. St. Br. 6 n.9, 13, 14, 20 & n.20, 23.

So, too, plaintiffs recognize that reinsurers can enter into similar agreements among themselves over the terms of insurance they will underwrite. St. Br. 23, 24. Reinsurers are, after all, insurers engaged in the business of insurance, and Congress recognized that they may "sit down together and make rules and regulations, forms, and rates." *Joint Hearing* at 265, 269.

Plaintiffs also admit that primary insurers and reinsurers must be free to confer and agree on the terms of primary policies that reinsurers are asked to reinsure and on the terms of reinsurance for those policies. St. Br. 29. The Solicitor General reaffirms this proposition. U.S. Br. 12. As Congress recognized, primary insurers and reinsurers have inseparable interests because reinsurers assume part of the risk specified in the primary policy. See Pet. Br. 1-2, 19-20, 33-34, 40.

Once it is accepted that the foregoing agreements are immune under McCarran, it follows that the inherent effects of such agreements cannot convert protected agreements into unprotected boycotts. Agreements covered by McCarran can be expected to have consequences that, in other industries, would be considered anti-competitive (and in some instances per se unlawful). See Pet. App. 56a-57a. But Congress understood that such agreements serve the public interest in the insurance business.

This principle is well settled in the federal courts. See Pet. Br. 41-42. The Department of Justice also concurs in it. As the Solicitor General previously explained to the Court in this case, a protected "agreement does not become a non-immune boycott merely because it has some effect on other insurers." U.S. Pet. Br. 13. Indeed, in its amicus brief in the Ninth Circuit (at 20 n.18), the Department acknowledged the correctness of this principle even where the agreement had the effect of totally eliminating a form of insurance coverage: "As the district court in this case observed ([Pet. App. 52a-55a]), any agreement to set the terms on which insurance will be offered to purchasers, if adhered to by all insurers, will result in an absence of insurers willing to deal on other terms. If such a concerted refusal to deal constituted a boycott within the meaning of Section 3(b) [of

McCarran], the antitrust exemption for state-regulated agreements among insurers as to the terms of policies would be meaningless."

2. In light of these settled principles, plaintiffs' claim of coercive enforcement conduct simply evaporates. Plaintiffs allege two types of enforcement activities: (a) agreements relating to the terms on which defendant reinsurers would provide reinsurance to non-defendant primary insurers, and (b) discontinuance of statistical support for ISO's superseded 1973 form. As a matter of law, neither claim can withstand scrutiny.

With respect to the alleged denial of reinsurance, plaintiffs concede that reinsurers are free to agree among themselves on acceptable terms for reinsurance generally, and that primary insurers and reinsurers may agree over terms of reinsurance for those primaries who are parties to the agreement. In plaintiffs' view, however, a boycott arises if the discussion between primary insurers and reinsurers provides that the same terms will be offered to other primary insurers. St. Br. 13, 29-30. Plaintiffs' naive insistence (*id.* at 24) that reinsurers' agreements on coverage terms must exist "in benign isolation" from the stated views of primary insurers (which plaintiffs rhetorically characterize as "cartel demands") is unsupported by any legal authority and has no relationship to the considerations Congress deemed relevant in distinguishing boycotts from protected agreements.

To begin with, plaintiffs' argument ignores the public interest in the uniformity of insurance that Congress and state regulators have long recognized promotes the financial soundness of insurers. See page 10, *supra*. Both primary insurers and reinsurers are affected by, and legitimately concerned about, the terms on which the business of insurance is generally conducted. See 91 Cong. Rec. at 1481 (Sen. Ferguson); H.R. Rep. No. 873, at 9.

Beyond this, the complaints nowhere assert that the alleged agreements among defendant primary insurers and reinsurers reflected anything but the business judgment and economic self-interest of each company as to acceptable terms of insurance. In particular, the complaints do not suggest that defendant primary insurers sought to (or even could) "boycott" or "coerce" defendant reinsurers in any way to compel them to accede to dictated terms. Plaintiffs' contention that reinsurers decided on acceptable primary

coverages as part of their discussions and agreements with defendant primary insurers is legally beside the point; the source of the idea—whether advocated by defendant primaries, devised by the reinsurers themselves, or derived from some other source—is simply immaterial. As a matter of law, the claim that the reinsurers agreed, of their own accord, not to reinsure certain unacceptable coverages does not establish a McCarran boycott. See pages 9-12, *supra*.

Plaintiffs' boycott theory is, moreover, completely unworkable, as the facts of this case well illustrate. Primary insurers typically deal with many reinsurers on particular risks and treaties, and reinsurers similarly deal with many primary insurers. Accordingly, every time a primary insurer discussed the terms of its reinsurance agreement with any of its reinsurers, it would "expose[ ] itself to the highly plausible claim" (*Business Elec.* v. *Sharp Elec.*, 485 U.S. 717, 728 (1988))—which could not be resolved on pretrial motion—that it had "suggested" or "requested" or "agreed to" similar terms regarding other primaries. Given these uncertainties, which Congress meant to eliminate (see page 15, *supra*), most insurers and their advisory organizations "would be likely to forgo legitimate and competitively useful conduct rather than risk treble damages." 485 U.S. at 728.

Plaintiffs' further claim—that ISO discontinued its statistical support for the 1973 form once the states had approved the 1986 forms—is even less substantial, and little need be added to our opening brief (at 40-41).[11] As Congress understood, a principal justification for standardized insurance forms is to provide a sufficient universe of comparable experience to generate reliable loss data and actuarial projections. See Pet. Br. 33 & n.15; American Ins. Ass'n Am. Br. 22-24. It would be incompatible with that congressional design and with settled practice in the insurance industry to require insurers and their advisory organization, upon pain of losing McCarran immunity, to continue to bear the expense of compiling statistical support for a superseded form.

[11] Apparently recognizing that plaintiffs' argument is untenable, the Solicitor General places no reliance on this ground.

F. ***State insurance regulation.*** Plaintiffs assert (St. Br. 29) that their boycott theory is compatible with Congress's policy of entrusting regulation of the insurance industry to expert state insurance regulators rather than to lay jurors and judges in federal antitrust proceedings. Nothing could be further from the truth.

It is undisputed that state insurance regulators intensively reviewed the ISO standardized advisory forms at issue here. It is also undisputed that the changes in long-tail insurance terms, which plaintiffs challenge here, were determined by state regulators to be in the public interest. Pet. Br. 6-8. To allow antitrust courts to intrude in this area, on the ground that there was an alleged "boycott" of certain primary-insurance terms, runs headlong into the system of state regulation that Congress preserved in McCarran. The radical relief plaintiffs seek—which would overturn considered judgments of state regulators on insurance terms—and their avowed "'nuclear attack on the insurance industry'" confirm as much. See Pet. Br. 9-10 n.6, 48.

As noted above (pages 3-6, *supra*), state insurance regulators possess ample powers to rectify any anti-competitive harms plaintiffs allege. The issue here is not whether McCarran leaves such harms uncorrected; it is which governmental body is empowered to regulate the insurance industry and address those concerns: state insurance departments or federal antitrust courts? The McCarran boycott provision allocates to antitrust enforcement a discrete category of clearly destructive and unjustifiable conduct whose validity does not depend upon detailed knowledge and expert judgments about the insurance industry; the broad remainder of the business of insurance McCarran commits to specialized state insurance regulators. A contrary conclusion would lead to the very "chaos and confusion" in the insurance industry that Congress intended McCarran to avoid. See page 6, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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